

1967

Contracts

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Recommended Citation

Charles L. Knapp, James W. Carroll, and James A. Clarkson, *Contracts*, 1967 *Ann. Surv. Am. L.* 405 (1967).

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Author: Charles L. Knapp
Source: Annual Survey of American Law
Citation: 1967 Â Ann. Surv. Am. L. 405 (1967).
Title: *Contracts*

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CONTRACTS

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CHAPTERS 6 and 7 of the American Law Institute's *Restatement (Second) of Contracts*, covering Beneficiaries and Assignment, respectively, were issued during 1967.¹ Principal changes in Chapter 6 include an abandonment of the terms "donee" and "creditor" beneficiary² and a corresponding revision of the rule governing later variation of the beneficiary's rights by the contracting parties.³ The provisions on assignment are rearranged and renumbered, and include some changes of substance;⁴ the most important part of Chapter 7, however, seems to be its extensive Introductory Note, which graphically suggests the considerable extent to which statutes of various sorts (particularly the Uniform Commercial Code) have reduced the importance of any statement of the common law of assignment of contract rights.

I

UNCONSCIONABILITY

Odorizzi v. Bloomfield School District, 54 Cal. Rptr. 533 (1966);
Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

James W. Carroll is a newly appointed Articles Editor of the *Annual Survey of American Law*. Mr. Carroll wrote "Lost or Stolen Credit Cards."

James A. Clarkson is a newly appointed Articles Editor of the *Annual Survey*. Mr. Clarkson wrote "Unconscionability."

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1. Restatement (Second) of Contracts (Tent. Draft No. 3, 1967).

2. Id. § 133. The designation "intended" beneficiary is employed instead, to describe any beneficiary who acquires rights. Id. See the Introductory Note to Chapter 6, which discusses this change.

3. Id. § 142. This change at first appears to increase the vulnerability of the beneficiary; treatment of all intended beneficiaries as one group abrogates the former "vested" character of the donee's rights. Compare §§ 142-43 of the original Restatement of Contracts (1932). However, this appearance is countered by the addition in the new § 142(3) of a reference to "assent" by the beneficiary as one of the events which ends the power to vary his rights.

4. Examples include the following: The category of assignable future rights is broadened to include the right to payment "expected to arise out of [a] . . . continuing business relationship," § 153; The rule permitting contractual prohibition of the power to assign, § 149(2) (c), is drastically weakened by a strong new rule of construction to the contrary, § 154; New protection against loss of rights by virtue of a later modification of an executory contract is provided for the assignee, § 170(2) (patterned on § 9-318(2) of the Uniform Commercial Code).

One of the most controversial sections of the Uniform Commercial Code is Section 2-302, dealing with unconscionable contracts and clauses. The primary function of this provision is to enable courts to police contracts directly, by passing explicitly on the question of unconscionability, rather than indirectly, by manipulating legal concepts or adversely construing contract language.⁵ These latter methods were condemned by the framers of the Code as resulting in needless confusion in case-law development (thus breeding unnecessary litigation) and as merely encouraging contract draftsmen to greater ingenuity in phrasing substitute provisions.⁶ Unfortunately, Section 2-302 has in turn come under heavy criticism. Opponents have attacked it as an undue interference with freedom of contract⁷ and have asserted that it destroys stability in commercial transactions by permitting courts to "make" new contracts for the parties.⁸

Perhaps the most perceptive criticism of Section 2-302, however, is that voiced during this past year by Professor Arthur Leff.⁹ Unlike the majority of the critics of Section 2-302, Professor Leff is basically receptive to the underlying policy of this part of the Code. His ground of attack is that Section 2-302 does not too much, but too little, in that it does nothing to clarify the meaning of "unconscionable";¹⁰ instead of providing definite criteria to guide judicial analysis in this area, Section 2-302 and its accompanying comments leave the courts with only vague generalities on which to base their decisions.¹¹ Tracing the history of Section 2-302 through its various preliminary versions, Professor Leff attributes its present vacuousness primarily to the failure of its draftsmen "to appreciate the significance of the unconscionability concept's necessary procedure-substance dichotomy."¹² By recognizing the distinction between the "process of contracting" and "the resulting contract," and by identifying for the courts the relevant factors to be considered within each of these areas in deciding the unconscionability issue, Professor Leff argues, definite contours and limits, necessary to the application of so general a concept as "unconscionability," would be provided.¹³

5. Uniform Commercial Code § 2-302, comment 1 [hereinafter cited as UCC].

6. See Note, Unconscionable Contracts Under the Uniform Commercial Code, 109 *U. Pa. L. Rev.* 401, 418 (1961).

7. See generally Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 *Colum. L. Rev.* 629, 630 (1943); Llewellyn, What Price Contract?—An Essay in Perspective, 40 *Yale L.J.* 704, 732 (1931).

8. See, e.g., Wilson, Freedom of Contract and Adhesion Contracts, 14 *Int'l & Comp. L.Q.* 172 (1965).

9. Leff, Unconscionability and the Code—The Emperor's New Clause, 115 *U. Pa. L. Rev.* 485 (1967).

10. *Id.* at 487.

11. The so-called "basic test" in UCC § 2-302, comment 1, is an unhelpful tautology, defining unconscionability merely in terms of itself.

12. See Leff, *supra* note 5, at 488.

13. *Id.*

The result of what Professor Leff would describe as the fundamental drafting misconception of Section 2-302 has apparently been twofold: (1) Very few courts have used it as a basis for decision, most preferring instead to reach a just result by means of the more traditional approaches such as duress, undue influence, failure of consideration, or lack of mutual assent;¹⁴ and (2) Those courts that have attempted to utilize the "unconscionability" approach have succeeded only in compounding the confusion already inherent in the language of Section 2-302.¹⁵

In light of this rather dismal portrayal of the present state of Section 2-302, it might be useful to contrast two recent cases, one decided on traditional principles, the other relying primarily on Section 2-302. The first, *Odorizzi v. Bloomfield School District*,¹⁶ was an action by a school teacher for "rescission" of his resignation, which had been submitted and accepted shortly after his arrest on criminal charges (later dismissed, for reasons not disclosed in the opinion) of homosexual activity. Immediately upon his release on bail, Odorizzi's superiors had come to his apartment and strongly recommended that he resign his position with the District. After impressing on Odorizzi the potentially embarrassing consequences of a refusal to quit, they requested that he make his decision at once, without consulting an attorney. The basis of Odorizzi's claim was that his

14. Excluding *Dobbs, Inc. v. Johnson*, discussed in the text accompanying notes 24-42 *infra*, the following reported opinions are apparently the only ones which in one way or another have relied on § 2-302: *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), remanding 198 A.2d 914 (D.C. Mun. Ct. App. 1964) (decided as if § 2-302 were the law of the jurisdiction); *In re Dorset Steel Equip. Co.*, 2 UCC Rep. Serv. 1016 (E.D. Pa. Aug. 2, 1965), and *In re Elkins-Dell. Mfg. Co.*, 2 UCC Rep. Serv. 1021 (E.D. Pa. July 22, 1965), consolidated on appeal, 253 F. Supp. 864 (E.D. Pa. 1966) (suggesting the extension of § 2-302 into art. 9 of the UCC); *American Home Improvements, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 586 (1964) (alternative holding); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Electronics Corp. of America v. Lear Jet Corp.*, 286 N.Y.S.2d 711 (Sup. Ct. 1967); *Paragon Homes, Inc. v. Crace*, 4 UCC Rep. Serv. 19 (N.Y. Sup. Ct. Feb. 1967); *Paragon Homes, Inc. v. Langlois*, 4 UCC Rep. Serv. 16 (N.Y. Sup. Ct. Feb. 1967); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. City of N.Y. 1967); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. Nassau County 1966); *Sinkoff Beverage Co. v. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

15. A perfect example is the New Hampshire court's handling of the issue in *American Home Improvements, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (alternative holding). In a very brief analysis, the majority concluded that a contract for doors and siding should be held unconscionable and void because the defendants were paying a total of \$2,568 for goods and services valued at far less. While one might agree with the court's result, the uncomfortable aspect of this decision is the way in which the result was reached; the disproportionate exchange was examined only superficially and from a very narrow standpoint. The final determination thus seems to have rested merely on the judge's own personal reaction to the transaction, which may give a fair result, but which offers little practical assistance to future courts faced with similar problems. Professor Leff's point here is that the vague language of § 2-302 encourages a court to behave in just this way.

16. 54 Cal. Rptr. 533 (1966).

resignation was invalid because obtained by the defendant through duress, fraud, mistake, and undue influence, and because given at a time when he lacked capacity to contract. A demurrer to the complaint was sustained by the Superior Court of Los Angeles County, but the district court of appeal reversed, holding that Odorizzi had alleged facts sufficient to support a claim of undue influence.¹⁷

This case has a number of interesting aspects. In the first place, judicial acceptance of the undue influence defense¹⁸ has been surprisingly rare in contract cases,¹⁹ even though the sort of misconduct sufficient to justify avoidance of a contract on the ground of undue influence would seem less extreme, and perhaps easier of proof, than that required for most similar defenses, such as fraud and duress.²⁰

More important to our discussion, however, the California district court of appeal's decision provides other courts with an excellent example of careful analysis. The court begins by separating the concept of undue influence into two major components: vulnerability of a person to overpersuasion; and use of excessive pressure which does succeed in overcoming the will of that person.²¹ Each component is in turn divided into its characteristic elements, forming a legal framework within which the facts of the case are examined, thereby enabling the court to point out explicitly why *this* transaction might be open to the attack of undue influence. As proof of Odorizzi's "vulnerability to overpersuasion," the court notes that he was possibly under a severe mental and emotional strain at the time he signed the resignation, due to his recent subjection to the process of arrest, questioning, and booking, and to his lack of sleep for 40 hours.²² "Use of excessive pressure," on the other hand, is found in the School Board's insistent demands that the business be finished at once without the assistance of counsel or third-party advisors, its use of "multiple persuaders," and its insistence on discussion of the transaction at an unusual and inappropriate place and time (at Odorizzi's home, immediately after his release on bail).²³

17. *Id.* at 538.

18. In *Odorizzi*, of course, undue influence was more than a defense; it was employed by *Odorizzi* affirmatively to establish "a cause of action for rescission of a transaction to which his consent had been obtained through the use of undue influence." *Id.* at 543.

19. For the most part, courts have applied the doctrine of undue influence in situations involving wills, or fiduciary or confidential relationships. See, e.g., *In re Wood's Estate*, 37 Mich. 278, 132 N.W.2d 35 (1965); *Lipson v. Lipson*, 183 So. 2d 900 (Miss. 1966); *Hammer v. Betenbaugh*, 274 N.M. 74, 404 P.2d 110 (1965); *West v. Henry*, 173 Ohio St. 397, 183 N.E.2d 369 (1962); *Frye v. Norton*, 148 W. Va. 500, 135 S.E.2d 603 (1964).

20. *Kazaras v. Manufacturers Trust Co.*, 4 App. Div. 2d 227, 164 N.Y.S.2d 211 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 930, 151 N.E.2d 356, 175 N.Y.S.2d 172 (1958).

21. 54 Cal. Rptr. at 541.

22. *Id.* at 540.

23. *Id.* at 543.

Although *Odorizzi* is based purely on traditional legal concepts (neither Section 2-302 nor the term "unconscionability" are mentioned), it forms an excellent example of one type of "procedural unconscionability," as Professor Leff uses that term. The court quite plainly found no fault with the substance of what was in effect simply an agreement by the parties to rescind *Odorizzi's* employment contract; its only objection was to the quality of the bargaining process itself, to the way in which that agreement was reached. The opinion also exhibits the type of painstaking analysis which can result from the careful application of a well-developed and sensible rule of law by a fair-minded court. It is this type of analysis which commentators such as Professor Leff, critical of the vague holdings encouraged by the ambiguous language of Section 2-302, would like to see courts employ in considering the potential unconscionability of a contract.

In contrast, consider the New Jersey case of *Ellsworth Dobbs, Inc. v. Johnson*.²⁴ This case involved a claim by a real estate brokerage firm for commissions allegedly earned in a real estate transaction. The Johnsons, owners of the land involved, entered into a written agreement to sell the property to one Iarussi. There was no doubt that Dobbs had brought the parties together and into a signed contract of sale. Title did not close, however, because of Iarussi's inability to obtain financial backing for his intended development of the property. In its action against the Johnsons, Dobbs pleaded that, as a matter of law, its right to a commission had vested upon the execution of the contract of sale with Iarussi, and that the contract itself should be read as so providing. The trial court agreed and, in finding for plaintiff, refused to submit the case to a jury for determination. The appellate division reversed this decision, holding that there was a jury question.²⁵ The supreme court, in turn, modified this ruling and ordered that judgment be entered for the Johnsons.²⁶

The supreme court's opinion is divided into two parts. The first is devoted to a re-evaluation of existing New Jersey case law as to a real estate broker's right to his commission. While ostensibly following the general rule that a broker's undertaking is fulfilled upon production of a willing and able purchaser, the New Jersey courts had broken with the majority of states in their interpretation of the term "able." Although other jurisdictions explicitly hold that "able" refers in part to the buyer's financial

24. 50 N.J. 528, 236 A.2d 843 (1967).

25. 92 N.J. Super. 271, 223 A.2d 199 (1966).

26. Iarussi was a co-defendant in the suit, Dobbs having charged him with breach of an implied agreement to pay its commission should he fail to complete the purchase. The New Jersey supreme court, modifying the appellate division's holding, remanded the case against Iarussi for a new trial. The relationship between Iarussi and Dobbs was clearly not the ordinary broker-buyer relationship; it is of course possible that the chance of a remedy for Dobbs against Iarussi had some effect on the court's decision to exonerate the Johnsons.

ability to complete his purchase,²⁷ the rule as developed in New Jersey was that a broker's right to commission vests when he has produced a buyer acceptable to the seller and when a contract of sale has been executed—regardless of the buyer's eventual failure to complete the transaction.²⁸

In the eyes of the present New Jersey supreme court, “[s]uch a rule, considered in the context of the real relationship between broker and owner, empties the word ‘able’ of substantially all . . . content and imposes an unjust burden on vendors of property.”²⁹ For Justice Francis, “[t]here can be no doubt that ordinarily when an owner of property lists it with a broker for sale, his expectation”—and that of any reasonable man—“is that the money for the payment of commission will come out of the sale,”³⁰ and fairness and reason thus require that this be the rule in New Jersey.

Thus far, the *Dobbs* opinion merely seems to lay down a new rule of construction for those brokerage contracts in which the buyer's inability to pay is not expressly dealt with. Of more general importance, however, is the court's ensuing discussion of the extent to which a broker may, by contract, thwart the newly declared general rule that the buyer's inability to pay will serve as a defense to the broker's claim for commission on the sale.³¹ Taking into consideration the particular characteristics of the real estate brokerage business and holding it to be “affected with a public interest,”³² Justice Francis arrived at the conclusion that a broker, by inserting a clause into its contract with a seller requiring that the commission be paid upon execution of the sales contract alone, is engaging in unconscionable conduct toward his principal in the matter of the commission. The court supported its determination of unconscionability on two general grounds: the gross unfairness of such a contractual provision; and the substantial inequality of bargaining power usually present between the real estate broker and his principal. As evidence of the unfairness of the clause, the court drew on its previous assertion that the ordinary seller reasonably contemplates that the purchase price will be the source of his commission

27. See, e.g., *Kaiser v. Shannon*, 120 Ind. App. 140, 90 N.E.2d 819 (1950); *Horero v. Dixon Real Estate Co.*, 188 So. 2d 623, 627 (La. Ct. App. 1966); *Globerman v. Lederer*, 281 App. Div. 39, 117 N.Y.S.2d 549 (1st Dep't 1952); *De Harpport v. Green*, 215 Ore. 281, 333 P.2d 900, 902 (1959); *Gartner v. Higgins*, 214 A.2d 849 (R.I. 1965).

28. *Hatch v. Dayton*, 130 N.J.L. 425, 33 A.2d 350 (Sup. Ct. 1943); *Hedden v. Folio*, 62 N.J. Super. 470, 163 A.2d 163 (App. Div. 1960); *Richard v. Faletti*, 13 N.J. Super. 534, 81 A.2d 17 (App. Div. 1951).

29. 236 A.2d at 853.

30. *Id.* at 852.

31. It is not at all clear from the opinion that this second determination by the court was essential to the final resolution of the case and was not mere dictum; the court did not reveal whether the contract before it actually contained provisions specifically requiring the broker's commission to be paid upon execution of the sales agreement. For examples of such provisions, see 236 A.2d at 857.

32. *Id.* at 856.

payment. Support for the finding of inequality of bargaining power rested primarily on the court's general conclusion that a broker possesses such expertise as to give him an undue advantage in dealing with his principal, and on the fact that standardized printed forms are often used by brokers and real estate boards. As a result of the combination of these factors, an agreement purporting to make the owner liable for a commission merely by virtue of the signing of a contract of sale, despite the buyer's inability to pay, was held "contrary to the common understanding of men and also so contrary to common fairness . . . as to require a court to condemn it as unconscionable."³³

The New Jersey court is to be commended for its attempt to utilize Section 2-302, especially because in so doing it was treating the Section as "a source of law to be reasoned from by analogy."³⁴ Justice Francis' willingness to extend the scope of Section 2-302 beyond the strict confines of contracts for the sale of goods is clearly consonant with the spirit of the Code.³⁵ Concerning the court's actual application of Section 2-302, however, serious questions may be raised. It does appear that the New Jersey supreme court at least met Professor Leff's first criticism of the Section; it did recognize "a procedure-substance dichotomy"³⁶ by making a distinction between the process of contracting (the bargaining) and the resulting contract itself. Unfortunately, the court failed to follow up this necessary step, especially in regard to procedural unconscionability, with a perceptive analysis of the relevant facts of the transaction before it, relating them to the two general components of unconscionability. Instead, the court apparently rested its holding as to procedural unfairness on the general conclusion that a broker has an undue advantage over his principal by the nature of his training and on the fact that a printed form is often used. There seems to have been no attempt by the court to consider such relevant factors as the number of other real estate brokers in the area, whether such brokers would be willing through negotiations to vary the clause in question relating to commissions, or, indeed, whether this clause was standard in every real estate brokerage form. Furthermore, the court did not indicate which of the factors it did mention were necessary to its finding of unconscionability, so that one is left wondering, for instance, whether such a clause could stand if fairly disclosed and bargained over,

33. *Id.* at 857.

34. For a general discussion of possible extensions of applicability of § 2-302 beyond sale of goods cases, see Note, *The Doctrine of Unconscionability*, 19 *Me. L. Rev.* 81, 86 (1967).

35. UCC § 2-102 and comments. See Vold, *Construing the Uniform Commercial Code—Its Own Twin Keys: Uniformity and Growth*, 50 *Cornell L.Q.* 49, 56 (1964); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 *Colum. L. Rev.* 880, 891-92 (1965).

36. See text accompanying notes 12-13 *supra*.

or whether it could stand if the principal were just as experienced in business and/or as economically powerful as the broker. Not only did the New Jersey court fail to shed any real light on the "unconscionability" concept, beyond the furnishing of one fact-pattern as an illustration, it even failed to give fair general guidance for the future on the precise type of contract sued on in *Dobbs*.

As to whether this superficial sort of analysis is in fact encouraged by the "misdrafting" of Section 2-302, as Professor Leff has asserted, it is interesting to note the difference between the analysis in *Dobbs* and the same court's opinion (written by the same justice) in the now famous *Henningsen v. Bloomfield Motors, Inc.*³⁷ That case involved a contract clause (automobile warranty disclaimer) so inimical to the public good, in the court's eyes, as to compel an adjudication of its invalidity; unlike its approach in *Dobbs*, however, in *Henningsen* the court did not utilize Section 2-302.

In *Henningsen*, in contrast to *Dobbs*, there is no uncertainty as to the exact scope or basis of the decision; the court explicitly outlined the essential components of its ruling. In arriving at its conclusion that the warranty disclaimer clause was unfair, the *Henningsen* court carefully screened the relevant facts and circumstances surrounding the transaction involved. Concerning the substance of the actual contract, special attention was directed to the delusive character of the protection offered by the warranty, as qualified.³⁸ Turning to what Professor Leff would label "procedural unconscionability," the court recognized two types of procedural unfairness: unequal bargaining power, and the use of deceit and trickery. In regard to the parties' relative bargaining power, Justice Francis emphasized the fact that the disclaimer was a standard part of defendant's auto-sales contracts and that the same provision was found in all forms employed by members of the Automobile Manufacturers Association (then representing 93 percent of all domestic passenger car production).³⁹ Thus the buyer could not have turned to a competitor for a better contract; he had virtually no choice but to take it or leave it. As evidence of the use of deceit and trickery, the court pointed to the extremely fine print and ambiguous language used in the paragraph containing the disputed clause⁴⁰ and noted that no attempt had been made to explain the provision to the buyer, or even to call it to his attention.⁴¹ In addition, the court did indicate, as it neglected to do in *Dobbs*, which of the factors mentioned were necessary to its finding of unconscionability and which were not. Justice Francis in *Henningsen* deliber-

37. 32 N.J. 358, 161 A.2d 69 (1960), 36 N.Y.U.L. Rev. 261 (1961), 1960 Ann. Survey Am. L. 311.

38. 32 N.J. at 375-77, 161 A.2d at 78-79.

39. Id. at 390, 161 A.2d at 87.

40. Id. at 365-66, 399, 161 A.2d at 73, 92.

41. Id. at 399, 361 A.2d at 92.

ately organized his opinion in such a way as to impress upon the reader the relative value of each of the elements contributing to his final determination, thus making as clear as possible the reach of the court's decision.

It would seem, from this comparison, that Professor Leff's criticisms concerning the present state of Section 2-302 have considerable force. Not using Section 2-302 as a basis for its analysis, the New Jersey court in *Henningsen* was forced to face the relevant policy questions and to talk specifically about the bases for its decision. Relying on Section 2-302, the same New Jersey court, in *Dobbs*, was most particularly enabled not to.⁴² Unless courts begin to use the power contained in Section 2-302 with the precision of analysis exemplified by *Odorizzi* and *Henningsen* (representing traditional common law and "pre-Code" unconscionability, respectively), it appears that the resulting "fuzziness" of rationale (and, in some cases at least, the overprotective result which is liable to flow from a decision on purely emotional grounds) will in the long run either result in the discrediting of Section 2-302, or else lead to a widespread sacrifice of "law" for "justice"—when, with a little greater effort, we might have both.

II

LOST OR STOLEN CREDIT CARDS

Allied Stores of New York, Inc. v. Funderburke, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (Civ. Ct. City of N.Y. 1967); *Uni-Serv Corp. v. Frede*, 50 Misc. 2d 823, 271 N.Y.S.2d 478 (Civ. Ct. City of N.Y. 1966); *Uni Serv Corp. v. Vitiello*, 53 Misc. 2d 396, 278 N.Y.S.2d 969 (Civ. Ct. City of N.Y. 1967).

The credit card originated as a device to facilitate the extension of credit by a merchant to his customers, each card being usable only by the named holder at the issuer's place of business (typically a department store).⁴³ In the 1920's, oil companies began issuing cards which would be honored at all the issuer's many service centers; some companies also honored each other's cards.⁴⁴ More recently, a new type of issuer has entered the field—the purely financial institution which, pursuant to contract, pays thousands of independent merchants for purchases charged to the cards it issues and then bills the holders.⁴⁵ Such a tripartite credit plan lessens the

42. For a better-reasoned recent approach to § 2-302 than that in *Dobbs*, influenced perhaps by the necessity to accommodate negotiable-instruments law and UCC § 9-206 as well, see *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

43. Bergsten, *Credit Cards — A Prelude to the Cashless Society*, 8 *B.C. Ind. & Com. L. Rev.* 485, 485-86 (1967).

44. Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 *Calif. L. Rev.* 459, 460-61 (1960).

45. Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 *Val. U.L. Rev.* 218, 218-19 (1967).

issuer's ability to control the honoring of the card and thus increases a card thief's opportunities to make unauthorized purchases. As credit cards proliferate and gain in potency,⁴⁶ the question of liability for these purchases becomes increasingly important.⁴⁷

Early decisions established that, absent an agreement, the holder would not be liable for unauthorized purchases unless his negligence had made them possible.⁴⁸ Issuers thereupon began to protect themselves by inserting risk-shifting clauses in the contract between issuer and holder.⁴⁹ These provisions purport to bind the holder to pay for all charges (even those not authorized by the holder) incurred before the issuer's receipt of written notice of the card's loss or theft.⁵⁰ Such "liable until notice" clauses (which in effect require the holder to safeguard his card or risk liability to the issuer) generally have been held enforceable,⁵¹ but their all-encompassing language has been judicially qualified by the imposition of a corresponding duty of due care on the issuer: The courts have insisted that "issuer, his agents, and privies" take some precautions in honoring the card.⁵² In addition, the New York state legislature has declared such a clause to be "effective only if it is conspicuously written or printed in a size at least equal to eight point bold type."⁵³ This statute requires only a minimum of procedural fairness in the formation of the agreement; it by no means assures that an applicant for a credit card will, at the time of contracting, understand or even be aware of the obligation he assumes.⁵⁴

46. An estimated 140,000,000 cards are currently in use. *Id.* at 221 n.13. Some even enable the holder to obtain unsecured loans, as well as retail credit. Murray, A Legal-Empirical Study of the Unauthorized Use of Credit Cards, 21 *U. Miami L. Rev.* 811, 812 (1967).

47. This subject has received considerable attention from legal writers recently; see notes 43-46 *supra* and note 49 *infra*. Relevant cases through 1966 are collected in 15 *A.L.R.3d* 1086 (1967).

48. *Lit Bros. v. Haines*, 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923). See also *Thomas v. Central Charge Serv., Inc.*, 212 A.2d 533 (D.C. Ct. App. 1965) (holder's failure to fulfill an implied promise to exercise due care in the use of his card held insufficient ground for recovery).

49. Macaulay, Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards, 19 *Vand. L. Rev.* 1051, 1076 (1966).

50. *Id.* at 1073.

51. *Texaco, Inc. v. Goldstein*, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (Civ. Ct. City of N.Y. 1962), *aff'd*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (App. T. 1963) (*per curiam*); Note, 12 *De Paul L. Rev.* 150 (1962).

52. *Union Oil Co. v. Lull*, 220 Ore. 412, 433, 349 P.2d 243, 252 (1960). Accord, *Gulf Refining Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790 (1945).

53. N.Y. Gen. Bus. Law § 512.

54. The statute seems to fall short of even its limited goal, as the credit card application need not contain the liability clause; the statutory requirement is satisfied if the clause merely appears on the card itself. If a holder considers his obligation at all, he does so when he applies for the card and not, in all probability, upon receiving it. Such a discrepancy between the application and the credit card makes the latter a counteroffer by the issuer, and "[c]ounteroffers to nonmerchants to be accepted by silence border on deception." Bergsten, *supra* note 43, at 498 n.68.

Three New York trial court cases (all dealing with credit cards that satisfied the statute's minimum requirements) raise the more basic question: How can courts protect an issuer's legitimate interest in minimizing its losses caused by unauthorized purchases without also permitting it to place an unconscionable burden on the holder? In *Allied Stores of New York, Inc. v. Funderburke*,⁵⁵ the department store-issuer sought to recover for purchases made by a thief while defendant was unaware of the loss of her card. Defendant, a dining room attendant, had left the state on a visit 2 weeks after losing her card; having no occasion to use the card, she failed to discover its loss until after her return 2 weeks later, when plaintiff's monthly statement disclosed that 237 purchases had been charged to her account. Plaintiff had breached its duty of care, the court found, in allowing over \$2,300 in charges to accumulate in a month's time despite a \$200 limit on defendant's line of credit. Instead of denying recovery on this ground, however, the court propounded a novel doctrine: Defendant's unawareness of the loss of her card made it "impossible" for her to give notice, and thus excused her from liability for unauthorized purchases unless resulting, in some respect, from her negligence.

The court recognized the risk-shifting clause as generally binding, but reasoned that its comprehensive language did not apply to this situation simply because the provision failed to *specifically* cover it.⁵⁶ This construction seems unjustified, even in light of the familiar rule that, after considering all the evidence, any remaining ambiguity in a standardized contract will be resolved against the drafter.⁵⁷ The clause by its terms not only seems to be clear and unambiguous, but also appears to have been designed to cover precisely this situation.⁵⁸ Having removed the dispute from the area of contract law (to its own satisfaction, at least), the court turned to tort principles and denied recovery for lack of any evidence of negligence by defendant holder.

Had there been some such evidence, however, plaintiff's chances of recovery would still have been uncertain. Nowhere did the court define negligence in the context of a lost-credit-card situation. There are at least two

55. 52 Misc. 2d 872, 277 N.Y.S.2d 8 (Civ. Ct. City of N.Y. 1967), criticized in Bergsten, *supra* note 43, at 495-96; Murray, *supra* note 46, at 817; Note, 46 *Neb. L. Rev.* 749, 751 (1967).

56. New York's credit car statute, N.Y. Gen. Bus. Law § 512, (see text accompanying note 53 *supra*) was also held inapplicable, as not covering this specific situation. The court referred to a bar association report which termed the statute's effect on liability unclear in the absence of any contract whatsoever. 107 Comm. on State Legislation Rep. 465, 8 *Ass'n of the Bar of the City of N.Y. Bull.* (1961).

57. 3 A. Corbin, *Contracts* § 559 (1960).

58. Any provision dealing with "loss or theft" of a card must be intended to comprehend cases in which the holder is unaware of the loss, at least for a time, as the holder will knowingly "lose" his card only in the rare instance when an accident forcibly separates him from his belongings. Impossibility might fairly excuse the holder in a more extreme case, however. See note 62 *infra*.

relevant aspects of the holder's conduct—care taken to prevent loss and diligence in discovering it—but the opinion gives no hint whether a failure as to either or both will be sufficient to make out negligence. Furthermore, as the inaction or inattention likely to constitute such negligence is peculiarly within the defendant's knowledge, the problem of proof is so formidable as to preclude recovery in most cases.

*Uni-Serv Corp. v. Frede*⁵⁹ further circumscribed the holder's liability for unauthorized purchases, in a dictum which echoed *Funderburke* in its insistence on specificity in the contractual language. Defendant Frede had applied for a Uni-Serv card, but claimed never to have received it. Plaintiff alleged mailing the card, but could prove only a business custom of mailing each card upon approval of the application. This proof failed to establish a contract because, although there is a presumption that a letter properly addressed and mailed reaches the addressee, "there is no presumption of mailing."⁶⁰ The court thus did not have to decide the question whether, if a contract had come into existence,⁶¹ a defendant who had never received his card could be held liable.⁶²

The court did assume, *arguendo*, that a contract had arisen, in order to consider whether defendant's liability would nevertheless be limited to the amount of his maximum credit allowance (which the thief had exceeded). After referring to the rule that contracts are to be construed strictly against the drafter, the court declared: "Plaintiff, had it desired to foist upon defendant an obligation for an unlimited amount—in the event of loss of the card—should have stated this obligation in clear language."⁶³

An opposite conclusion was reached, on this issue, in *Uni Serv Corp. v. Vitiello*.⁶⁴ Mrs. Vitiello had diligently telephoned Uni Serv to report the loss of her card, but was merely told to make a written report of the loss. The thief made 18 purchases in the 3-day interval between the telephoned notice and issuer's receipt of the written notice required by the agreement. The court held defendant liable for the full amount, with the brusque com-

59. 50 Misc. 2d 823, 271 N.Y.S.2d 478, (Civ. Ct. City of N.Y. 1966), *aff'd*, 53 Misc. 2d 644, 279 N.Y.S.2d 510 (App. T. 1967) (*per curiam*).

60. 50 Misc. 2d at 825, 271 N.Y.S.2d at 481.

61. The application form provided that the agreement was "not valid until accepted by Uni-Serv in New York by mailing [the card]." *Id.* at 823-24, 271 N.Y.S.2d at 481. A contract would probably be held to have existed from the time of mailing even without such language, under the deposit-acceptance rule. *Wester v. Casein Co. of America*, 206 N.Y. 506, 100 N.E. 488 (1912); 1 A. Corbin, *Contracts* § 78 (1963).

62. A particularly hard problem would arise if it could be proved that the card was in fact lost in the mail. If the contract were held to have been formed upon mailing, would defendant then by its terms be liable for unauthorized use of the card? Such a situation would appear to be one in which a court could fairly say that impossibility of giving notice excuses the defendant, on the ground that the clause was not drafted to cover a loss which the holder could not by his own efforts either prevent or discover.

63. 50 Misc. 2d at 826, 271 N.Y.S.2d at 483.

64. 53 Misc. 2d 396, 278 N.Y.S.2d 969 (Civ. Ct. City of N.Y. 1967).

ment that she could have telegraphed.⁶⁵ The contrast between this court's attitude and that of the *Frede* and *Funderburke* courts makes one wonder how each would treat a case like *Vitiello* if it involved an agreement like that in *Funderburke*, which required not merely written notice, but notice *by certified mail*. Mailing entails an inevitable time lag; would this fact be held to justify use of a telegram or even oral notice?

Voluntary reforms by some issuers, such as contractual limitation of the holder's liability to \$50 or \$100,⁶⁶ provision of insurance against the risk of unauthorized purchases,⁶⁷ and an asserted "general policy of non-enforcement" of such claims⁶⁸ have lightened the burden for holders of their credit cards, but the legal problem remains. As in *Funderburke* and *Frede*, courts may artificially construe the present liability clauses in order to protect the holder, but this indirect approach will not necessarily have a lasting effect. Risk-shifting clauses were originally created as a response to decisions adverse to the issuer;⁶⁹ they can be redrafted to overcome any unfavorable decision based solely on construction of language (which must eventually yield to intention, if plain enough). In the long run, the risk of loss from unauthorized use of credit cards will remain where the contract puts it—on the holder until notice—unless the risk is redistributed by substantive rules which deal directly with the real question: What portion of an inevitable loss may the issuer shift to the individual holder, and what part must it either absorb out of profits or pass on to all holders through increased charges for its services?

A strong argument can be made that a question so complex as this can be adequately handled only by a legislature, not by a court.⁷⁰ The harsh results of cases like *Vitiello*, however, suggest that perhaps courts should take a hand initially (even at the risk of unduly favoring the individual holder),⁷¹ thereby shifting to the credit card issuers—many of them

65. Although perhaps the holder does not, strictly speaking, have a duty to notify the issuer of loss, so that the sums sued for are not damages flowing from the breach of such duty, it is nevertheless surprising that the court did not even mention the principle of mitigation of damages. Can the holder fairly be required to reimburse the issuer for losses it could reasonably have prevented? Mrs. Vitiello might have been held liable anyway, but in fairness to her it seems the court should have at least considered the possibility of mitigating action by Uni Serv.

66. Davenport, *supra* note 45, at 244.

67. *Id.* at 244-45 n.119.

68. South, Credit Cards: A Primer, 23 *Bus. Law.* 327, 333 (1968).

69. See authorities cited notes 48-49 *supra*.

70. This appears to be the conclusion reached in Macaulay, *supra* note 49, at 1121.

71. The presence of a comprehensive statute regulating credit card transactions would probably preclude, or at least severely restrict, such judicial intervention. However, a statute as limited as New York's should not be deemed to have such an effect. Cf. 107 Comm. on State Legislation Rep., *supra* note 56, which makes no comment on the possibility that a risk-shifting clause might be held ineffective for some reason despite compliance with the minimum requirements of the statute.

powerful and influential financial institutions—the burden of arousing the legislature to remedial action if necessary.⁷²

III

AGREEMENTS TO AGREE

Coleman Engineering Co. v. North American Aviation, Inc., 65 Cal. 2d 396, 420 P.2d 713, 55 Cal. Rptr. 1 (1966).

One of the most durable (both in statement and in application) of all the basic precepts of contract law is that “an agreement to agree is not a contract”⁷³—or, more fully stated, that where the parties have concluded an agreement in which they postpone until some future time agreement on an “essential” or “material” term of their proposed exchange of performances, the original agreement does not reach the status of an enforceable contract.⁷⁴

It is possible, as *Hoffman v. Red Owl Stores, Inc.*⁷⁵ recently demonstrated, that at some stage during the negotiation process one party may induce the other materially to rely upon the reasonable expectation that a bargain will be reached, and as a result be held liable at least to reimburse losses resulting from such reliance. Absent such unusual additional factors, however, the courts will usually hold that no binding obligation is created until a recognizably complete bargain has been struck, with the corollary that where agreement on some important term has been explicitly put off, no contract has yet been made. In a recent typical case,⁷⁶ plaintiff sought to recover a \$7,500 “franchise fee” paid at the time he executed an application for a franchise from defendant to operate a restaurant and gift shop. The application recited: “Franchise agreement must be mutually acceptable to both parties.”⁷⁷ Defendant claimed that it was willing to meet all plaintiff’s reasonable objections, and that plaintiff’s refusal to consummate the franchise agreement was arbitrary and unreasonable; plaintiff admitted that he had decided to withdraw his franchise application “for personal reasons.”⁷⁸ The appellate court reversed a trial court’s dismissal of

72. This result—legislative response to initial court intervention—may well be the end product of *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967), discussed in Section I *supra*.

73. See, e.g., the discussion in 1 A. Corbin, *Contracts* § 29, at 84-85 (1963).

74. Restatement of Contracts § 32, illustrations 10-11, at 43 (1932).

75. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). See discussion in 1966 *Ann. Survey Am. L.* 138-43.

76. *John I. Moss, Inc. v. Cobbs Co.*, 198 So. 2d 872 (Fla. Dist. Ct. App. 1967). A later Florida decision is a good example of a case on the other side of the line. *Hughes v. Jemco, Inc.*, 201 So. 2d 565 (Fla. Dist. Ct. App. 1967).

77. 198 So. 2d, at 873.

78. *Id.* at 874.

plaintiff's refund claim, holding that since the application did not itself contain the essential terms of a franchise agreement, there was never any enforceable agreement, plaintiff's good faith (or lack of it) thus being irrelevant.⁷⁹

The common law rule referred to above clearly will result, in some cases, in a finding that no contract exists even where the circumstances are such that the parties apparently considered themselves to have concluded a formal, binding contract.⁸⁰ In an effort to avoid such anomalies, the sales article of the Uniform Commercial Code approaches the problem from a different angle. If the parties "have intended to make a contract," then according to Section 2-204(3) of the UCC the contract will not fail on the ground of indefiniteness, even though "one or more" terms are left for future agreement, provided only that there is "a reasonably certain basis for giving an appropriate remedy."⁸¹ Section 2-305(1) gives a more particular application of this principle: The parties can, "if they so intend," conclude a contract for sale despite the absence of a "settled" price; in such a case, if the price is left to be agreed upon by the parties and they fail to agree, then the price is "a reasonable price at the time for delivery."⁸²

"Price" being perhaps the one contract term most likely to be held material, it is obvious that application of the UCC approach to common law contract cases would change the result in a substantial number of

79. As an illustration of the lengths to which a court will go in finding gaps on essential matters, see *Mason v. Woodland Savings & Loan Ass'n*, 61 Cal. Rptr. 740 (Dist. Ct. App. 1967), holding an agreement to loan money to be incomplete despite the fact that the amount of the loan, the rate of interest, and the times for repayment of principal and interest had all been agreed upon, on the ground that although the money was to be loaned for the purpose of permitting the plaintiff to develop three parcels of land by building residences on them, there had apparently been no agreement on the type of residence to be built. The decision seems questionable, particularly in that the lack of agreement on this point appears not to have bothered anyone but the court (which suggested—as an admittedly "purely hypothetical" possibility—that perhaps an "ultra-modern" design was contemplated by plaintiff). *Id.* at 742.

80. See, e.g., *Canadian Nat'l Ry. v. George M. Jones Co.*, 27 F.2d 240 (6th Cir. 1928).

81. There is no theoretical limit on the number of issues which can be thus left open, although the comment to § 2-204(3) does admit that "the more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement."

82. Section 2-305(4) states that "there is no contract" in a case in which "the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed." Although this language might be read as meaning that in such a case a contract does exist until failure to agree on price becomes apparently final, comment 2 to this Section suggests that the quoted language simply restates the requirement of § 2-305(1) that the parties "intend" to "conclude" a contract at the time of the incomplete agreement; using this interpretation, if they at that time "intend not to be bound unless the price be fixed or agreed" then § 2-305(4) would apply, and § 2-305(1) would never come into play at all.

cases.⁸³ In its tentative draft of *Restatement (Second) of Contracts*, the American Law Institute has recently suggested, in effect, that the common law should now be deemed to follow the Code in this respect.⁸⁴

Against this background, the recent California case of *Coleman Engineering Co. v. North American Aviation, Inc.*⁸⁵ assumes considerable importance. Defendant North American was awarded a government contract for the construction of a mobile missile, the "Hound Dog," and invited bids for the construction of trailers to transport and position it. The specifications which accompanied the invitation were misleading as to the location of the missile's center of gravity when loaded on a trailer, a factor of great importance in the engineering and design of the trailers. Plaintiff's successful bid was based on an incorrect assumption as to the location of this center of gravity, a fact disclosed by the papers (initially unread by defendant) which plaintiff submitted with its bid. A series of purchase orders were drafted by defendant and delivered to plaintiff on July 6, 1959, based on defendant's original specifications and plaintiff's bid price.

The orders were eventually signed and returned by plaintiff on July 15. In the meantime, however, (on July 7) the misunderstanding as to the nature of the payload to be borne by the trailers had come to light. Plaintiff's engineers promptly pointed out that such a change in the assumptions on which plaintiff's designs had been based would entail both an increase in costs and a delay in performance, and requested a change in the defendant's specifications.

The requested change, redefining the location of the vertical center of gravity of the trailer payload, was not forthcoming until October. As soon as it was received, plaintiff requested (as a condition to its proceeding further) an adjustment in price and time for performance, pursuant to a "changes" clause in defendant's purchase order.⁸⁶ After considerable unsuc-

83. E.g., *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 139 N.E. 470 (1923); *Canadian Nat'l Ry. v. George M. Jones Co.*, 27 F.2d 240 (6th Cir. 1928).

84. UCC §§ 2-204(3) and 2-305 are reflected in § 32 and the comments thereto (particularly comment e) of *Restatement (Second), of Contracts* (Tent. Draft No. 1, 1964).

85. 65 Cal. 2d 396, 420 P.2d 713, 55 Cal. Rptr. 1 (1966).

86. The clause referred to read as follows: "Buyer reserves the right at any time to make changes in drawings and specifications, in methods of shipment and packaging, in schedules, and the place of delivery as to any material and/or work covered by this order. In such event there will be made an equitable adjustment in price and time of performance mutually satisfactory to Buyer and Seller, but any claim by Seller for an adjustment must be made within thirty (30) days of the receipt of such changes."

Id. at 400, 420 P.2d at 716, 55 Cal. Rptr. at 4. Such a clause (providing however that the adjustment be merely "equitable," not "mutually satisfactory") is standard in federal government procurement contracts. See *Crowell & Johnson, A Primer on the Standard Form Changes Clause*, 8 *Wm. & Mary L. Rev.* 550, 551 (1967). See generally *Note, Equitable Adjustment of Government Contracts*, 42 *N.Y.U.L. Rev.* 302 (1967).

cessful negotiation on price adjustment, defendant finally informed plaintiff that the plaintiff's cessation of work would be considered a breach, and that defendant would procure the trailers elsewhere. Plaintiff responded with further offers with respect to an adjustment in price, but was informed that defendant had now ordered the trailers from another source. Plaintiff filed a claim for expenses incurred in performing pursuant to the purchase order and for profits lost as a result of defendant's alleged wrongful termination. The trial court held that a contract had been formed on July 6, that the clause providing for price adjustment was not an independent covenant, and that plaintiff had been justified in stopping work pending agreement on the new price; it awarded damages (including lost profits) to plaintiff on the theory that defendant's repudiation of the contract had been wrongful. A counterclaim by defendant, for damages based on the increased cost to defendant (over plaintiff's original price) of obtaining the trailers elsewhere, was denied.

A divided California supreme court affirmed (with modifications not here important) the judgment for plaintiff. In an opinion by Justice Peters, the majority declared that the plaintiff should recover even if the contract were not regarded as made until July 15, when the misunderstanding created by defendant's original specifications had become apparent. The court stated that the mere presence of a "changes" clause in the agreement should not necessarily cause the contract to fail for indefiniteness.⁸⁷ On the other hand, the court declared, a party should not be required to proceed with performance pending an agreement as to a particular change, where the change is of "great magnitude" in relation to the entire contract. He is required to negotiate in good faith to settle the adjusted price, the court pointed out, but plaintiff here was found to have met this obligation. Chief Justice Traynor's dissent, concurred in by Justice Mosk, argued that the court should have held that no contract existed, and that plaintiff was entitled to recover its reliance costs, but not its lost profit as well.⁸⁸

The dissent makes a persuasive case for the position that the parties can not be considered to have been bound to a contract (on a traditional "offer/acceptance" analysis) earlier than July 15 (a point expressly not decided by the majority,⁸⁹ which held that the result it reached would follow no matter when the contract came into existence). Even assuming the dissent to be correct on that issue, however, there remains the difficult problem of deciding whether a contract can properly be said to have come

87. This would clearly be true in the area of government contracts; whether it would carry over into the purely private sector might not be so clear. The instant case has features of both.

88. 65 Cal. 2d at 410, 420 P.2d at 723, 55 Cal. Rptr. at 11.

89. *Id.* at 404, 420 P.2d at 719, 55 Cal. Rptr. at 7.

into existence as late as July 15, given the intervening discovery of the need for amendment of the specifications and thus for adjustments of price and time. On this issue the dissent takes the orthodox position (buttressed by the parties' later disagreement on these points): Price and time for performance are so essential that absence of agreement thereon must prevent the formation of a contract.⁹⁰ The presence of a "changes" clause thus has no effect, because it is then equally "affected by the basic uncertainty that precludes the existence of a contract."⁹¹

This analysis may be unduly rigid in light of the purpose and function of such a clause.⁹² If the contract had been executed first, and only later had the need for changed specifications appeared, the dissent apparently would not hold that the contract was thereby abrogated; why then should it be otherwise where the parties have proceeded to execute a contract form containing such a clause, relying on the clause to provide machinery for reaching agreement in the area in which agreement is lacking?⁹³

However, finding the contract to have been formed on July 15 would not necessarily resolve this dispute in plaintiff's favor. Equally necessary to the judgment for plaintiff is a finding that defendant breached the contract by its eventual refusal to continue negotiating further with plaintiff and its decision to buy elsewhere. On this point the majority opinion seems open to question. The majority holds that plaintiff was justified in refusing to proceed further with performance until final agreement had been reached; were it to hold otherwise, this would in turn permit (though perhaps not require) a holding that defendant was justified in terminating in the face of plaintiff's repeated refusals to continue.⁹⁴ The majority justifies this position on plaintiff's right to suspend performance by pointing to the materiality of the points in dispute—even though it also holds that the existence of dispute on these same points, *known to both parties*, was not so material as to prevent the formation of a contract in the first place.

If this case were governed by UCC Section 2-305, it would appear that the majority could not have it both ways. Under this Section, either the parties "intend" a contract, or they don't; if they do, and reserve the matter of price for future agreement, then under the Code the price is "a

90. The dissenting justices conceded that as to the area of sales of goods the UCC has now changed the rule; their attempt to restrict the principle of § 2-305 as depending on other features of the Code seems somewhat lame. *Id.* at 417 n.6, 420 P.2d at 728 n.6, 55 Cal. Rptr. at 16 n.6.

91. *Id.* at 418, 420 P.2d at 728, 55 Cal. Rptr. at 16.

92. See generally Crowell & Johnson, *supra* note 86.

93. The dissent clearly accepts this view of the parties' intent. 65 Cal. 2d at 416, 420 P.2d at 727, 55 Cal. Rptr. at 15.

94. And this would in turn create the possibility of a right of action by defendant against plaintiff for material breach.

reasonable one" if they fail to agree, with no suggestion that performance can be suspended until such agreement is reached.⁹⁵ On the other hand, if they regard price as so important that they do not intend to be bound absent an agreement on price, then they have not made a contract at all.⁹⁶

This may seem too simple and mechanical an approach for application to a situation as complex as that in *Coleman*, where not just a sale but a process of design and manufacture is involved, very large sums are at issue,⁹⁷ and time for completion of performance also remains to be agreed on.⁹⁸ Even so, a question would still remain as to whether the remedy awarded by the majority is "appropriate," and has a "reasonably certain basis" (to use the language of UCC Section 2-204(3)). Although not stated clearly in the opinion, it appears that the majority in *Coleman* is upholding an award to plaintiff based on reimbursement of its expenses, plus an amount representing lost profit calculated with respect to the contract as originally envisioned by the plaintiff (i.e., based on the original price and on plaintiff's original understanding of defendant's specifications).⁹⁹ If the contract is deemed to have been formed at a time when this view of the contractual exchange had already been abandoned by both parties, it may be argued that it can hardly form an "appropriate" basis for a remedy. Conversely, where the parties reserve price for future agreement and later fail to agree, it can also be argued that profit lost cannot be computed with any reasonable certainty with respect to the contractual exchange as revised; this would seem especially true in *Coleman*, where there would be difficulty in setting any price in the abstract as a "reasonable" price for the trailers, even if plaintiff did succeed in proving with sufficient certainty the cost of fully meeting defendant's revised specifications. The dissent argues for an award of reliance costs (only) to plaintiff, *despite*

95. Although UCC § 2-609 gives the right to suspend performance when "reasonable grounds for insecurity arise" with respect to the other party's performance, the comments give no firm indication whether failure to reach agreement on price under § 2-305 would constitute such "insecurity."

96. See the discussion in note 82, *supra*.

97. The initially agreed-on price was over \$500,000; the plaintiff's initial claim for an adjusted price was over \$1 million. Damages awarded plaintiff were nearly \$300,000.

98. It seems important to note, however, that in the case of a government contract with a similar clause there would be no right to suspend performance pending determination of the adjustment. See vom Baur, *Remedies of Contractors with the Government*, 8 *Wm. & Mary L. Rev.* 469 (1967). There is an exception in the case where a change ordered is so great in magnitude or quality as to constitute a departure from the "general scope" of the original contract. Crowell & Johnson, *supra* note 86, at 557-59. However, in the *Coleman* case the latter possibility seems to be precluded by the fact that plaintiff executed the order knowing precisely the kind of change in specifications which the defendant would propose.

99. 65 Cal. 2d at 407, 420 P.2d at 721-22, 55 Cal. Rptr. at 9.

the absence (it thinks) of a binding contract;¹⁰⁰ unless the trial court was right in finding a contract to have existed on July 6 (on the basis of plaintiff's original understanding of defendant's specifications), it may well be that damages should be thus limited even if a binding "agreement to agree" is held to have been formed.

100. The dissent's position on this point is based on a liberal application of the "restitutionary" principle which would view the performance of work or service at request as being equivalent to a "benefit conferred." *Id.* at 419, 420 P.2d at 728-29, 55 Cal. Rptr. at 16-17.